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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN D. ASHCROFT, :

ATTORNEY GENERAL, :

Petitioner :

v. : No. 03-218

AMERICAN CIVIL LIBERTIES :

UNION, ET AL. :

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Washington, D.C.

Tuesday, March 2, 2004

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:12 a.m.

APPEARANCES:

GEN. THEODORE B. OLSON, ESQ., Solicitor General, Department  
of Justice, Washington, D.C.; on behalf of the  
Petitioner.

ANN E. BEESON, ESQ., New York, New York; on behalf of the  
Respondents.

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1 P R O C E E D I N G S

2 (11:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next  
4 this morning in No. 03-218, John D. Ashcroft v. The American  
5 Civil Liberties Union.

6 General Olson.

7 ORAL ARGUMENT OF GEN. THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONER

9 MR. OLSON: Mr. Chief Justice, and may it please  
10 the Court:

11 The Child Online Protection Act addresses a  
12 problem that all three branches of our national Government  
13 have repeatedly and consistently described as compelling,  
14 the pervasive and essentially unavoidable commercial  
15 Internet pornography that inflicts substantial physical and  
16 psychological damage on our children.

17 COPA was carefully drafted by Congress after  
18 hearings, debate, reports, and findings according to  
19 explicit guidance from this Court as to how constitutionally  
20 to address and resolve and deal with this -- this menace.  
21 The compelling need is overwhelming and is growing.  
22 Internet pornography is widely accessible, as easily  
23 available to children as a use of a television remote. This  
24 Court has noted, as Congress has, that immense psychological  
25 and immeasurable physiological harm is done. The --

1           QUESTION: Mr. Olson, part of the problem is that  
2 the pornography laws that would apply to adult viewers don't  
3 seem to be enforced very well, the obscenity laws. There  
4 are very few prosecutions, and yet there's all kinds of  
5 stuff out there. What's -- what's going on?

6           MR. OLSON: Well --

7           QUESTION: I mean, if they were enforced, a lot of  
8 the problem would be assisted.

9           MR. OLSON: Well, it -- in the first place, Justice  
10 O'Connor, while there may have been some lapse in --  
11 diminution in obscenity prosecutions a number of years ago,  
12 the information that I'm given, and it's not in the record,  
13 is that 21 indictments have been brought in the last 2  
14 years, 17 have involved Internet. But the problem with  
15 respect to the children is the material that is so widely  
16 available on the Internet that doesn't reach the definition  
17 of -- that is not as bad as obscenity. It is a wide amount  
18 of information.

19           The legislative history described 28,000  
20 pornographic sites in a -- this is also outside the record,  
21 but if an individual goes to their Internet and -- and uses  
22 an Internet search engine and -- and types in the word, free  
23 porn, I did this this weekend, the -- your -- your computer  
24 will say that there are 6,230,000 sites available. Now  
25 that's available now --

1           QUESTION: Well, how many sites are there available  
2 altogether on the Internet?

3           MR. OLSON: Well, there are -- there are a great  
4 deal more than that, Mr. Chief Justice, and I don't know the  
5 exact number, but I believe the record, with respect to the  
6 Child Online, COPA, uses -- describes those numbers, but it  
7 is increasing enormously every single day, but the --

8           QUESTION: Yes, even -- even the 28,000 was at the  
9 time this bill was enacted.

10          MR. OLSON: That's right.

11          QUESTION: So I'm -- so I assume --

12          MR. OLSON: And so the --

13          QUESTION: -- it's much greater now.

14          MR. OLSON: And every evidence that's available to  
15 us, and I don't think this is disputed by respondents, is  
16 that the number of Internet sites is growing up  
17 exponentially.

18          QUESTION: Those figures include the obscenity  
19 violations too, I assume? You're -- you're not just talking  
20 about sites that are affected by the Child Protection Act?

21          MR. OLSON: Well, I'm talking about sites that --  
22 that would be available to you --

23          QUESTION: Other things too, right.

24          MR. OLSON: -- to you or me --

25          QUESTION: Right.

1 MR. OLSON: -- or to a 12-year-old --  
2 QUESTION: Right.  
3 MR. OLSON: -- by typing in the word --  
4 QUESTION: Exactly.  
5 MR. OLSON: -- free porn --  
6 QUESTION: Exactly.  
7 MR. OLSON: -- where there would be no screen --  
8 QUESTION: Yeah.  
9 MR. OLSON: -- preventing the child from getting to  
10 that information.  
11 QUESTION: Yeah, and my first inquiry was -- was  
12 such a vast array of sites. There are so few prosecutions.  
13 It's just amazing.  
14 MR. OLSON: Well, as I said, the number of  
15 prosecutions are increasing. What -- what the -- what the,  
16 and United States Attorney manual asks United States  
17 Attorneys to focus on obscenity where there's evidence of  
18 organized crime --  
19 QUESTION: Now, you said free porn, not free  
20 obscenity.  
21 MR. OLSON: That's correct.  
22 QUESTION: Presumably they still can't advertise  
23 free obscenity. We -- we've drawn a line.  
24 MR. OLSON: That's correct, and I --  
25 QUESTION: Then I don't really understand, but

1     there's a line there somewhere between obscenity and  
2     pornography, right?

3             MR. OLSON: Well, there's a line there that this  
4     Court --

5             QUESTION: Pornography is okay?

6             MR. OLSON: Well, this -- what we're talking about  
7     today is something that would be described as -- and I'm  
8     using the term pornography as a shorthand version to  
9     describe what was described in the statute as harmful to  
10    children. That's a -- statute itself refers to obscenity  
11    and material which is harmful to children. It then goes on  
12    to describe the category of material that is harmful to  
13    children using the language that was approved by this Court  
14    in the Miller case, as modified by the Ginsberg v. New York  
15    case with respect to material which is harmful to children,  
16    which is broader than the definition of obscenity. The --

17            QUESTION: You're -- you're not suggesting that the  
18    free porn that you call up would not include any obscene  
19    material?

20            MR. OLSON: I did -- I didn't have time to go all  
21    the way through all those sites.

22            (Laughter.)

23            MR. OLSON: And -- and -- and it's not a pleasant  
24    --

25            QUESTION: I'd imagine you found some that it was

1     obscene.

2                     MR. OLSON: And it's -- I didn't. I -- the  
3     material that I saw and I think that the Court would see is  
4     that the people that are putting in -- these are -- this is  
5     material in front of, and the legislative history describes  
6     this, the material which is obscene is usually kept behind  
7     so-called blinders, which do -- which is a very good point  
8     here, because the very mechanism that the statute requires  
9     is already in existence with respect to commercial  
10    pornography sites.

11                    Justice Stevens, what the -- what the -- what the  
12    purveyors of this material do is put in front of the screen  
13    provocative material that we submit would meet the  
14    definition of harmful to children and make that available to  
15    everybody to entice people to go the next step to use their  
16    credit card or their age identification mechanism to go the  
17    next step.

18                    QUESTION: General Olson, you said something that I  
19    -- I would question. You -- you said it's just like the  
20    blinder racks, but it isn't, because I don't have to give my  
21    ID and I don't have to be concerned that someone will know  
22    that this person with this address and this credit card  
23    wants to look at this material. You can -- you can -- the  
24    -- the -- the idea of the blinder rack is to protect the  
25    child, but at the same time, the one who wants to see it



1       doesn't have to disclose his identity.

2               MR. OLSON: Well, you're disclosing your identity,  
3       Justice Ginsburg, because you're standing there in public  
4       examining those --

5               QUESTION: How many people are going to be in that  
6       adult store, bookstore with you, as opposed to giving your  
7       credit card number?

8               MR. OLSON: What you're -- what you're -- what  
9       you're disclosing your identity in person, I -- we would,  
10      the Government would argue that that is more invasive, but  
11      that nonetheless that there's some -- this is a counterpart  
12      to those blinder racks. In many of the convenience stores  
13      or adult bookstores or stores that you may go into where  
14      those blinder racks are, there are cameras recording the --  
15      the -- for protection of the shops, for other reasons,  
16      recording the presence of the person. We submit that in the  
17      privacy of one's home, use -- utilizing this information  
18      with the provision in the statute --

19              QUESTION: But the whole world can know about it if  
20      I've given my credit card number.

21              MR. OLSON: It -- it is a -- it is a crime under  
22      COPA for the persons providing that information pursuant to  
23      adult identification provisions, it's section, subsection d  
24      of COPA that makes it a crime to reveal that information.  
25      So there is protection built into the statute that protects

1 the person's anonymity with respect to using that material,  
2 which is not protected. When a --

3 QUESTION: Then why is there such resistance to  
4 giving the ID and the credit card? People resist giving it,  
5 their credit cards, and I think the two reports said that  
6 that was the case, the reports on COPA.

7 MR. OLSON: Well, some -- some people may.  
8 Congress made a -- some people -- there -- the numbers are  
9 not quantified at all, but there is privacy protection.  
10 Giving your identity is necessary going into a nightclub,  
11 going into an adult movie, or going into a bookstore and  
12 using this material. Some people may say, I don't want to,  
13 that's a price I don't want to pay, but it's not quantified  
14 in --

15 QUESTION: You don't have to give your credit card  
16 to go into the nightclub or the movie.

17 MR. OLSON: Well, you probably -- in some cases you  
18 don't, in some cases maybe you do. I don't know if there's  
19 a charge --

20 QUESTION: There -- there may be resistance made  
21 there not on the part of people to stand in front of blinder  
22 racks or to go into those portions of bookstores that are  
23 excluded, that exclude children because of the presence of  
24 pornography. There may be people who won't go into that  
25 section because they don't want to be seen there or don't

1 want to be seen standing in front of the blinder rack,  
2 although they'd be happy to look at pornography if it was  
3 mingled in with everything else.

4 MR. OLSON: That's correct, Justice Scalia, and  
5 Congress acknowledged that. There's no dispute by the  
6 Government --

7 QUESTION: Did -- I thought that at least we have  
8 some cases that -- that recognize that there is -- someone  
9 doesn't have to come forward and say, I want this material.  
10 That was the Lamont case where the person wanted to get  
11 whatever was being sent and didn't want to say, oh yes, I  
12 want to get that material. And Denver -- didn't Denver Area  
13 have the similar thing that a customer doesn't have to say,  
14 I don't take that stuff off my screen --

15 MR. OLSON: In the Denver Area case, the person had  
16 to make an application to unblock the material, that that  
17 material -- there's a big distinction in the Denver Area  
18 case because there wasn't a requirement of anonymity and a  
19 protection of privacy in the statute. But I guess the  
20 bottom line, Justice Ginsburg, is that, yes, we have to  
21 acknowledge that there is some burden that is imposed when  
22 you're required to identify yourself into the purveyor of  
23 this material, but that -- but you get to, you have the  
24 opportunity to do that in the privacy of your own home.

25 By statute, a criminal statute protects the

1 privacy of your doing that, and the -- and the balance that  
2 Congress struck, which is what this Court dealt with when it  
3 dealt with this statute two -- on two previous occasions,  
4 the Court did acknowledge that there's a compelling  
5 governmental interest here, and that significant harm is  
6 being done on a daily basis.

7           The magnitude -- we point this out on page 20 of  
8 our brief -- that 11 million children visit these porn sites  
9 every week, and that between the ages of 15 and 17, 70  
10 percent of the children, according to the statistics that we  
11 cite, visited porn site inadvertently. It is very difficult  
12 to avoid.

13           As we describe in our brief, the use of innocuous  
14 names, I'd mentioned last time that I was here and it hasn't  
15 changed, Whitehouse.com is a porn site. Many of these  
16 things that the evidence suggest children visit and visit  
17 accidentally or they're shown to by their friends, and then  
18 it's very difficult to get off --

19           QUESTION: Mr. Olson, the -- the court of appeals  
20 addressed certain principal flaws that it saw in the  
21 statute, and I wish you -- you could address those. First,  
22 whether there material taken as a whole includes the whole  
23 Web site or -- or the article and so forth, and you, I  
24 think, took a different position in the Third Circuit than  
25 you took here. And -- and the second is this question of

1 the definition of the commercial use. Could you -- could  
2 you address those?

3 MR. OLSON: Yes. We -- we submit, and Congress was  
4 basing its definitions on the decisions of this Court with  
5 respect to taken as a whole, as this Court put it in the, I  
6 think it's the Kois case, K-o-i-s case, from Wisconsin, and  
7 that comes from -- that comes from the Roth decision of this  
8 Court, the material to -- for -- for purposes of the  
9 performance of this statute must be taken not only in its  
10 content, but in its context.

11 Now, in many cases it won't be necessary to do  
12 that, but something that might appear to be harmful in one  
13 context, if it's examined as a whole and it turns out to be  
14 a part of an art exhibit or a anatomy book or a sex  
15 education program, that would -- would have redeeming value.  
16 It's this Court's decision that it's the protection of the  
17 communicator that the material be looked at as a whole.  
18 Congress carefully built that into the statute, and your  
19 second point, Justice Kennedy, is commercial purveyors of  
20 this --

21 QUESTION: Well, just -- but -- but before we leave  
22 the -- the whole, what is -- your position changed between  
23 the Third Circuit and here as to what we should look like,  
24 should we look at the whole -- are you saying now we should  
25 look at the whole Web site?

1           MR. OLSON: You may look at the whole Web site and  
2 -- and -- and it may be appropriate to look at the whole Web  
3 site, it may not be necessary. It may be in the defendant's  
4 interest. We're not suggesting that the whole Web site  
5 should not be looked at --

6           QUESTION: But I mean, how -- how is the purveyor  
7 or the -- the broadcaster supposed to know?

8           MR. OLSON: The broadcast -- with respect to the --

9           QUESTION: I mean, if we can't define what --

10          MR. OLSON: Well --

11          QUESTION: -- what the whole means --

12          MR. OLSON: Well, this Court -- what -- this Court  
13 has defined that. It is -- requires looking at the material  
14 in the context it's which -- it's presented. In addition,  
15 in --

16          QUESTION: But it's presented on a screen.

17          MR. OLSON: It's presented on a screen --

18          QUESTION: One -- one screen at a time.

19          MR. OLSON: Certainly, Justice Kennedy, but one  
20 page in a book is presented at a time, one book in a  
21 library, one magazine in a bookstore.

22          QUESTION: Yeah, but as we all know, this -- this  
23 is -- a book, we know about book, but the Web site is  
24 different, and that's where we're struggling.

25          MR. OLSON: Well, that's right, and we're saying

1     that the entire Web site may be looked at as a whole to see  
2     the context in which the material is presented. These are  
3     protections that the Court think are available and should be  
4     concluded within the statute to protect the communicator.  
5     So if the communicator is accused of putting the material  
6     out there that otherwise might fit these definitions, and  
7     the person doing the communication said, you have to look at  
8     the whole Web site, this was in an art gallery and so forth  
9     and those pictures were a part of that exhibit, that's a --  
10    that's -- the reason why Congress put that provision in  
11    there is that this Court repeatedly said it was necessary to  
12    protect First Amendment rights, and in *Ginzburg, U.S. v.*  
13    *Ginzburg*, the Court said the context might be considered in  
14    terms of how the manner is being purveyed, is there  
15    pandering going on, is it being put out, is --

16                 QUESTION: But that's not obvious in the text of  
17    the statute, because it says, it says any image, any  
18    article, any image. Then it could be any image taken as a  
19    whole.

20                 MR. OLSON: But --

21                 QUESTION: The question that -- that I have is, you  
22    -- you have clarified what the statute means in this  
23    respect, you've also said that harmful to minors, the minor  
24    in view is the normal 16-year-old, but the statute doesn't  
25    say that, and since we're dealing with a content

1 restriction, is it good enough for you to give a narrowing  
2 construction of words that are susceptible to a broader  
3 meaning?

4 MR. OLSON: The -- I have submit that the -- what  
5 the -- with the issue of as a whole as a part of the  
6 statute, taken in the context which it is given, it -- it --  
7 the -- this is -- this is part 6 of the definition, which is  
8 on page 189a of the appendix to the cert petition -- that  
9 the -- the context of that is quite clear that the material  
10 is --

11 QUESTION: Well, three -- two -- yeah. No, it was  
12 three, wasn't it, judges on the Court of Appeals for the  
13 Third Circuit missed it?

14 MR. OLSON: That's why we're here. But the -- the  
15 fact -- and I -- and I submit this. In the first place,  
16 this Court has repeatedly said, and it said last year in --  
17 in connection with the McCain-Feingold case, that if there's  
18 a reasonable construction or a narrowing construction to  
19 which the statute is reason -- readily susceptible, the  
20 Court will adopt it in order to avoid the constitutional  
21 question, but I don't even think that's necessary in this  
22 context.

23 The contact of -- context of as a whole comes to  
24 this Court from the -- comes to Congress through a series of  
25 definitions and actual cases by this Court, so -- and the



1 legislative history is manifestly clear that what Congress  
2 was trying to do in this case -- case -- is to adopt these  
3 -- this Court's definitions of those things, and if I can --

4 QUESTION: Why did you --

5 MR. OLSON: Those were book cases.

6 QUESTION: -- pick 16-year-olds instead of 17-year-  
7 olds if you want to use the old -- the oldest minors? Where  
8 -- how -- how did you come up with 16-year-olds?

9 MR. OLSON: Because this Court --

10 QUESTION: And I mean, you know, maybe you -- you  
11 won the battle by losing the war.

12 MR. OLSON: Well --

13 QUESTION: You -- you're going to allow to come in  
14 without any restriction under this statute for a 5-year-old  
15 anything that wouldn't be -- wouldn't be bad for a 16-year-  
16 old.

17 MR. OLSON: Well, there's two --

18 QUESTION: Is that a great victory?

19 MR. OLSON: There's two answers to that, Justice  
20 Scalia. As this Court has repeatedly said, the Constitution  
21 does not require impossible definitions. What is -- what  
22 puts a person reasonably on notice is an appropriate way to  
23 go, and what -- the -- the reason why it was 16 rather than  
24 17, of course, is because this Court criticized the previous  
25 statute because it drew the line at a different age.

1           It would be impossible, I submit, for Congress to  
2   select a different age for every different piece of  
3   material. What Congress was trying to get at was the worst  
4   problem, the material that even with respect to 16-year-olds  
5   meets the standards set out in the statute. That at least  
6   --

7           QUESTION: How do we know that? I -- I doubt that  
8   very much. I -- I think Congress probably wanted a good  
9   deal of stuff that might be okay for 16-year-olds not to --  
10   not -- not to be shown --

11          MR. OLSON: No, as a matter of fact --

12          QUESTION: -- to really young children.

13          MR. OLSON: As a matter of fact, Congress was very  
14   clear that what it was adopting is what this Court had  
15   previously considered in the American Booksellers case and  
16   those blinder racks and the -- and the definition that came  
17   out of the American Booksellers case and the subsequent  
18   Fourth Circuit definition of that term in that case, of  
19   which this Court subsequently denied cert. Those bookseller  
20   blinder rack cases are exactly cited in the legislative  
21   history.

22          This is a remarkable instance of where Congress  
23   went through all of the things that the Court identified as  
24   problems with the previous statute, grappled with each of  
25   these definitions, adopted Court-approved definitions,

1 standards, and limitations with respect to what this Court  
2 has agreed is a compelling problem.

3           If I can return to Justice Kennedy's concern about  
4 the issue of -- take -- the commercial pornographers, the  
5 statute is very clear that it refers to people that are in  
6 the business of profiting from this material, and then the  
7 Court -- the statute goes on to say what is the business of  
8 being engaged in this and says that someone that takes time,  
9 effort, or labor in the regular course of a business of --  
10 of profiting from the transmission of this material.

11           So the legislative history, the previous iteration  
12 of the problem in this Court makes it clear that what  
13 Congress was concerned about and was -- was not trying to  
14 capture with this statute the person that occasionally  
15 transmitted a -- a photograph or an image, but someone who  
16 is in the business of doing this on a regular basis for  
17 profit.

18           QUESTION: Well, but the -- the doing -- the this  
19 is having the whole Web site, and -- and I, you know, I -- I  
20 concede it'd be a very difficult task if we told the  
21 Congress you come -- you come up with some definition of the  
22 commercial pornographer. On the other hand, it seems to me  
23 that this is very -- very sweeping. We -- even leaving  
24 aside the question of non-profit associations and so forth,  
25 people that have these Web sites will tell you that 100

1 percent of what they do is for profit.

2 MR. OLSON: Well, the answer to that, Justice  
3 Kennedy, is the -- the fact that this is not any -- that  
4 that definition, what the Congress adopted at the suggestion  
5 of this Court, was the same definition that this Court had  
6 approved in prior contexts with respect to obscenity, 18  
7 U.S.C. 1466, and that definition, commercial use of  
8 obscenity, is something that prosecutors and courts have  
9 been dealt -- been dealing with for a couple of -- for over,  
10 well over a generation, for several decades. So --

11 QUESTION: Mr. Olson, may I ask you a question  
12 about the -- on the -- the meaning of this very provision?  
13 Supposing a beer company or a cigarette company used for  
14 advertising purposes regularly used material that would fit  
15 the definition. Would they be violating the statute?

16 MR. OLSON: Yes, I believe they would, Justice  
17 Stevens, that if the idea is to sell -- to use the material  
18 that fits the definition, I keep saying the word pornography  
19 because I want to use the shorthand, and that is to make  
20 commercial use of it by making money out of it, whether they  
21 sell --

22 QUESTION: Well, they're making money out of the  
23 sale of -- of the product, which itself is not pornographic.

24 MR. OLSON: That's --

25 QUESTION: But -- but if it's regular advertising,

1     you think that would -- that would meet it?

2                 MR. OLSON: Yes, I -- Congress would not have  
3     wanted to create that massive loophole, because the people  
4     that are -- this is a multi-billion dollar business, the  
5     people that are doing it would readily adapt to that kind of  
6     a loophole. The other one that was suggested by the  
7     respondents is that -- and the, and by the Third Circuit --  
8     is that somehow Congress should have required that this  
9     would be the primary business that the person was engaged  
10    in. Again, that would have been a massive loophole subject  
11    to constant litigation over what was the primary business  
12    and whether a person's surrounded the harmful material with  
13    an acre or two of unharmful material.

14                What Congress was getting at is that people that  
15    are in the business, knowing and knowing the character of  
16    the material, two other terms that are in the statute, that  
17    are making money distributing this material and who won't  
18    take the steps necessary to protect minors from them.

19                With respect to the argument that the respondents  
20    make and the court of appeals focused on that blocking at  
21    the home might somehow be a problem, Congress carefully  
22    considered that, decided it would not be an acceptable  
23    solution, except that it did at the same time enact -- that  
24    it enacted COPA, required that the Internet service  
25    providers make that type of information available to people

1 in their homes so that that could be in addition to what  
2 COPA requires.

3 The fact is that blocking material in the home is  
4 both underinclusive and overinclusive. It requires the  
5 consumer to go out and buy a product and spend money to  
6 adapt it to technological improvements that are happening  
7 all the times, and it's readily avoidable. I did the same,  
8 this again is outside the record, but I did this, anyone can  
9 do this, the same experiment over the weekend. I went to  
10 Google and I typed in disable filter and you push the button  
11 and you will get a screen full of programs that will tell  
12 you step by step how to dismantle the computer so your  
13 parents won't know about it. It is that easy, and you can  
14 put it back on.

15 These things are readily avoidable. So the burden  
16 that Congress was -- was -- the burden that Congress imposed  
17 at the suggestion of this Court is to put the burden on the  
18 person or persons making money on a regular basis from this  
19 product to take the minimal steps necessary to prevent the  
20 damage that's done every day by minors by allowing people to  
21 use mechanisms that are already in place. This Court  
22 mentioned it and Congress mentioned it, this adult check  
23 mechanism, that's another thing that -- that anyone can  
24 check out. Type in adult -- adult ID, and then press the  
25 button and you will find, I think there were 25 sites that

1 mention in the congressional history which will provide an  
2 adult identification at a relatively nominal cost, I think  
3 it was 19.95 for a several-month period or something like  
4 that, and the availability is such that the steps that can  
5 be followed take a matter of less than a couple of minutes.

6           So in the privacy of the home, the adult who wants  
7 material protected by the Constitution, in order to avoid  
8 damage to children in the privacy of the home with statutory  
9 protection as to anonymity, the -- the problem can -- it --  
10 it cannot be totally solved, but this is an important major  
11 step and this is an example of Congress following the  
12 directions of this Court as to how constitutionally to do  
13 it.

14           Mr. Chief Justice, I'd like to reserve the balance  
15 of my time.

16           QUESTION: Very well, General Olson.

17           Ms. Beeson, we'll hear from you.

18                       ORAL ARGUMENT OF ANN E. BEESON

19                       ON BEHALF OF THE RESPONDENTS

20           MS. BEESON: Mr. Chief Justice, and may it please  
21 the Court:

22           COPA violates the First Amendment for two  
23 independent reasons. First, it is a criminal statute that  
24 suppresses a wide range of protected speech between adults  
25 on the Web, and second, the Government has a range of more

1 effective, less restrictive tools available to protect  
2 minors. The Government's attempt to narrow the range of  
3 speech that is affected by this statute defy the law's plain  
4 language, the record, and plain common sense.

5 Even under the Government's interpretation, COPA  
6 criminalizes speech that under any definition adults have  
7 the right to access. It criminalizes a depiction or even a  
8 description of nudity or even a description or depiction of  
9 the female breast. It does not just cover sexual conduct.

10 QUESTION: Now, I thought what it said is it picks  
11 up the definition that this Court has used for obscenity. I  
12 thought that definition was primarily an appeal to the  
13 prurient interest and it cannot have any -- it has to lack,  
14 taken as a whole, serious literary, artistic, political, or  
15 scientific value, and it adds the word, for minors. For a  
16 16- or 17-year-old, I'm not sure there'd be much difference.

17 MS. BEESON: I --

18 QUESTION: And -- and so, I looked through all your  
19 stuff, or not all of it, but some of it, and I'd like you to  
20 point out for me, what is the material there that has that  
21 serious scientific value, which you have quite a lot of --

22 MS. BEESON: Yes.

23 QUESTION: -- but that the statute would forbid?

24 MS. BEESON: Yes. Two points, Your Honor. First,  
25 the obscenity statute actually covers only sexual conduct.



1 It does not cover mere depictions of -- of nudity and it  
2 does not cover just an image of the female breast, so I  
3 think that that's an important difference.

4 QUESTION: It has to be an image or whatever image  
5 they are that appeal to the prurient interest. Now, that to  
6 me is material that does not communicate.

7 MS. BEESON: Yes.

8 QUESTION: It is material that is looking for a  
9 kind of emotional response, period. No communication and  
10 trying to elicit a certain emotion response, all right? And  
11 it lacks serious artistic or cultural or other value, all  
12 right? Now, what is the material that you point to, because  
13 most of yours I think didn't fit that definition. In fact,  
14 I couldn't find one that did fit it.

15 MS. BEESON: Your Honor --

16 QUESTION: So I want you to tell me which is the  
17 one that fits it.

18 MS. BEESON: Yes, and, Your Honor, the question  
19 ultimately is what a speaker on the Web who communicates  
20 material like this will do, what they think is covered by  
21 the law, whether they will self-censor everything they think  
22 --

23 QUESTION: Oh, I would imagine it's what we say is  
24 covered by the law.

25 MS. BEESON: Your Honor, I don't think so, under

1     this Court's precedents. In other words, if the -- if the  
2     record shows, and if the law covers, material that clearly  
3     has value for adults but lacks value for minors, there has  
4     to be some distinction there or otherwise this turns into  
5     the obscenity statute. There is no difference. In other  
6     words, there is material that has --

7             QUESTION: You're going a little fast. Would you  
8     slow down, Ms. Beeson? I didn't get your last --

9             MS. BEESON: Sure.

10            QUESTION: -- clause.

11            MS. BEESON: Sure, sure, Your Honor, of course.

12     The point is that the serious value for minors clause does  
13     not protect as much material as the serious value for adults  
14     clause in the obscenity statute. That by definition must be  
15     true, and in fact, as a society, just even using common  
16     sense --

17            QUESTION: Did you get my question? I wanted you,  
18     I was serious in my question.

19            MS. BEESON: Yes.

20            QUESTION: I want to know, I would like some  
21     citations. You don't have to --

22            MS. BEESON: Absolutely.

23            QUESTION: -- hold it up.

24            MS. BEESON: Yes, Your Honor.

25            QUESTION: But I -- I want to know what you think,

1 in other words, are your prime examples, because I'm tempted  
2 to look at them, and if I thought that this statute didn't  
3 cover it, why not say so? Why not say all these things that  
4 the ACLU is worried about, given the Government's effort,  
5 are outside the statute? Would that take care of your  
6 problem? But tell me which they are.

7 MS. BEESON: Yes, let me do that. First, there are  
8 numerous discussions in the -- in the record of lesbian and  
9 gay sexual pleasure and the pleasure of sex outdoors. This  
10 is not sex education materials. These are materials  
11 intended for adults which explicitly discuss sexual  
12 pleasure.

13 Let me give a few citations: PlanetOut, in the  
14 joint appendix, 658 to 69; BlackStripe, the joint appendix,  
15 753 to 57; and the Susie Bright column. She is a sex  
16 therapist, she is -- she talks about sexual pleasure. She  
17 is not talking about educational material. The purpose of  
18 her columns are to invite adults to discuss and to read  
19 about sexual pleasure if they want --

20 QUESTION: Exactly, and I don't think that that's  
21 prurient. I think a discussion about sex is a totally  
22 different thing from a -- a discussion that is itself  
23 supposed to be part of a sexual response, all right?  
24 They're night and day different.

25 MS. BEESON: Your --

1                   QUESTION: Now -- now you tell me why that isn't  
2   so.

3                   MS. BEESON: Your Honor, let me put this another  
4   way. This statute covers written text. All of the exhibits  
5   that have been put in by the Government are of images. I  
6   don't know what else could be covered that is written text  
7   that, you know, other than our client's material, in other  
8   words, what is left. That is what they are. They are --  
9   they are prurient discussions, they are intended for adults,  
10  they have value for adults, but they lack value for minors.  
11  That is the concern. It's a very big concern. There are a  
12  lot of people on the Web that communicate that.

13                  And as a society, again, there's a lot of material  
14  in this, we have defined a wide range of material as having  
15  value for adults and lacking value for even older minors. A  
16  16-year-old cannot get into an R-rated movie. If you're a  
17  speaker on the Web and you communicate material that's like  
18  Bertolucci films, for example, or Sex and the City, you are  
19  going to be very, very worried. The Government has made  
20  your speech a crime and you have only three options under  
21  the statute. All of those options violate the First  
22  Amendment.

23                  The first option is that you can take a risk and  
24  leave your speech up there, Justice Breyer, as you're  
25  saying, you know, leave it up there. You're Susie Bright

1 and you think that your -- your speech is not covered. What  
2 happens? You can go to jail, not because you made that  
3 column deliberately available to a minor, but because you  
4 merely displayed the column to the general public. That is  
5 a pure violation of this Court's rule in *Butler v. Michigan*  
6 that you cannot make it a crime to display material to  
7 adults in the name of protecting children.

8 The second option. You're worried, you don't want  
9 to go to jail, you self-censor. Everything that you have  
10 self-censored, adults had the right to access. It violates  
11 the First Amendment for the Government to do this through  
12 the statute.

13 The third option is that you can set up costly  
14 screens, which the record shows drive away your users. The  
15 district court and the court of appeals also specifically  
16 found that because of the risk of criminal penalties, it's  
17 quite likely that you never get to the defenses because the  
18 vast majority of rational speakers, when faced with this  
19 choice, are going to self-censor, and that is speech that  
20 adults had the right to get.

21 This Court, for that reason --

22 QUESTION: You're talking about self-censoring.  
23 You're meaning an interpretation of the statute that is not  
24 warranted by the -- the proper interpretation, I take it?

25 MS. BEESON: No, I'm not. I -- no, I'm not, Your

1 Honor. I think this is very different than the -- than that  
2 problem, the self-censorship problem with the obscenity  
3 statute, and here's why. Under the obscenity statute, if  
4 you self-censor material that is actually obscene, there's  
5 no First Amendment problem.

6 QUESTION: That's the whole point of the thing.

7 MS. BEESON: Exactly. There's no First Amendment  
8 problem. That speech is illegal. If you self-censor speech  
9 under COPA that we can all agree is harmful to minors,  
10 whatever that is, it's harmful to minors, you have self-  
11 censored material that adults have the right to access.  
12 That's the fundamental difference, and that is why this  
13 self-censorship is problem with this statute is so much  
14 broader than it -- than it could ever be in the obscenity  
15 statute.

16 Now, you also have --

17 QUESTION: If -- if you run that self-censor, I  
18 mean, you -- you could not have any laws protect. I -- I  
19 suppose the laws that require certain categories of  
20 materials to be put in these, what do we call, the blinder,  
21 blinder racks, I -- I suppose that -- that's invalid on the  
22 same basis because those magazines that want to appear in  
23 the general readership rack will self-censor them --  
24 themselves so that they won't be put in there, right? So  
25 all of those, and I think every state has laws like that,

1     they're all invalid because of self-censorship?

2             MS. BEESON: Your Honor, we think that -- first of  
3     all, this Court has never upheld an -- a harmful to minors  
4     display statute, and in fact --

5             QUESTION: I understand we haven't, but what --  
6     what's your view? The argument you're making suggests that  
7     they're all bad.

8             MS. BEESON: We think that that is one of the three  
9     First Amendment burdens that these kinds of statutes impose.  
10    The first one is the self-censorship problem. The second  
11    one --

12            QUESTION: All right. But that alone is not  
13    enough, you think?

14            MS. BEESON: We think that it would be enough --

15            QUESTION: Okay.

16            MS. BEESON: -- but the point is under COPA --

17            QUESTION: Then all the blinder racks are bad?

18            MS. BEESON: And under -- under this law -- under  
19    this law, Your -- Your Honor, there are two additional  
20    burdens which are much greater than the online blinder rack  
21    statutes, and in fact, it's quite notable that even though  
22    some states, it's about half of the states that have display  
23    statutes as opposed to statutes like Ginsberg that make it a  
24    crime to simply sell directly to a child material that's  
25    harmful to minors, those same states that have passed and in

1 some cases upheld offline display statutes have now struck  
2 down online display statutes because they have reached the  
3 same conclusion that the district court and the appellate  
4 court in this case found and that is that there is --

5 QUESTION: Well, their supreme courts did, their  
6 supreme courts did. I mean, don't represent it as a  
7 judgment of the people of the states by their legislature.  
8 You're saying that -- that there were state supreme courts  
9 that struck it down, right?

10 MS. BEESON: I'm saying that there are -- there  
11 were Federal courts that have struck down now seven state  
12 online harmful to minor statutes because they have  
13 recognized the distinction between those statutes in the  
14 online context and the offline context, and let me just get  
15 to that second problem, you know, self-censorship being the  
16 first problem, self-censorship of speech that under any  
17 definition is protected for adults.

18 The second one, the -- let's just assume that you  
19 -- that you want to go ahead and try to set up these  
20 screens, first of all, a credit card is a form of payment,  
21 it is not an ID. This is not just a matter of flashing your  
22 ID if you're a young-looking adult and the bookstore owner  
23 is not quite sure that you're -- you're an adult yet. This  
24 is a matter of every single adult having to -- to provide  
25 their credit card to a Web site every time they visit a new



1 Web site. The --

2 QUESTION: But there's a -- there's an alternative,  
3 the ID, you -- it doesn't have to be a credit card.

4 MS. BEESON: Your Honor, there is an alternative in  
5 the statute. What the record shows is that to get an adult  
6 ID, the primary way to get that is through a credit card.  
7 So another problem you have very similar to the problem  
8 identified by this Court in Reno v. ACLU is that, you know,  
9 almost all adults without credit cards have no way to access  
10 this speech at all, and again, you don't even -- you don't  
11 even get to this problem if, of course, the Web speaker has  
12 chosen the first option and has self-censored and not even  
13 tried to set up the screens.

14 So the other -- the -- the other thing that's very  
15 different, of course, about the blinder rack statutes is  
16 that none of them required the adults to actually register  
17 or disclose their identity. Credit cards create a permanent  
18 transaction, a permanent record of the transaction, and the  
19 -- the potential for abuse, because they are a form of  
20 payment, is much greater than merely flashing an ID.

21 QUESTION: Yes, but the Government says that  
22 there's a statutory protection that they cannot -- that the  
23 -- the person who gets the information can't pass it on to  
24 third parties.

25 MS. BEESON: Your Honor, there was actually --

1     there actually was a similar protection in the Denver Area  
2     case, which this Court found irrelevant given the remaining  
3     burden on -- on adults having to identify themselves before  
4     they seek access. In both the Denver Area case and in the  
5     Playboy case, this court -- Court -- struck down very  
6     similar burdens on adult speech. The burden here is much  
7     greater because the quantity and diversity of speech  
8     affected is much greater and the number of users affected is  
9     greater.

10             I would also like to point out that there's --

11             QUESTION: Well --

12             MS. BEESON: -- loophole in that privacy  
13     protection, which is -- which is right in the --

14             QUESTION: Well, who -- who says that they're  
15     guaranteed anonymity? I mean, if you go buy a gun, you're  
16     certainly not guaranteed anonymity.

17             MS. BEESON: Your Honor, the anonymity -- there  
18     actually -- this Court has held, of course, that there is a  
19     right to access --

20             QUESTION: When -- what --

21             MS. BEESON: -- protected speech anonymously, but  
22     that is not really what's at issue here. What's at issue is  
23     what the effect of the law is on protected speech for  
24     adults, and what the anonymity cases show is that if you  
25     have to give up your anonymity, a lot of people are going to

1 be deterred, and that's what the record in this case shows  
2 too.

3 General Olson acted as if there was nothing in the  
4 record about the number of times. In fact, there is quite a  
5 lot in the record.

6 QUESTION: Well, you -- you say you're not relying  
7 on what you refer to as anonymity cases for this  
8 proposition?

9 MS. BEESON: I'm saying that I think that those  
10 cases are relevant only to the extent that they show that  
11 anonymity often deters -- that the -- the loss of anonymity  
12 will deter viewers. Here there is evidence, and it isn't  
13 even just the -- the loss of anonymity that's the problem,  
14 it's also the stigma of being associated with material  
15 that's been labeled by the Government as illegal, and that  
16 was a stigma that the Court also found relevant in striking  
17 down the Denver Area case.

18 I wanted to just quick --

19 QUESTION: If -- if it really -- if it really were  
20 illegal, then the stigma would be irrelevant, don't you  
21 think?

22 MS. BEESON: The -- the -- if it were illegal to?

23 QUESTION: Suppose you were stigmatized by having  
24 subscribed to poor -- to obscenity. You couldn't object to  
25 that.

1 MS. BEESON: No, no, no. But here, again, the --  
2 the speech is protected for adults. They have the right to  
3 access as -- as the Court held in Lamont and in Denver Area  
4 and in Playboy.

5 QUESTION: Now, you have a third -- the third  
6 point. The first is there's too great a risk of self-  
7 censorship. The second is a screening requires loss of  
8 anonymity, and what's the third?

9 MS. BEESON: The -- the third was the four -- first  
10 point I made, Your Honor, which is that if you -- the  
11 defenses don't help you at all if you take a risk and -- and  
12 assume that your speech is protected and in fact the  
13 Government thinks it isn't. You know, you're Susie Bright,  
14 you put the column up, you think it's, you know, you think  
15 it's okay. The defenses don't help you and you're going to  
16 jail, not because you gave it deliberately to a child, but  
17 because you displayed it to an adult.

18 QUESTION: Well, that seems to me just really much,  
19 very much like the point that -- that the statute sweeps too  
20 broadly, there's a risk of too great self-censorship.  
21 That's really the same point, isn't it?

22 MS. BEESON: Your Honor, I -- I don't think it is  
23 the same point. I really think it's a -- it's a very  
24 distinct point, because the point is the speaker has two  
25 choices. They can either take a risk and display the

1 speech, in which case they go to jail. They go to jail not  
2 because they gave it to a child, that's the only kind of a  
3 statute this Court has upheld. That's the -- that's what  
4 they upheld in Ginsberg is that you can make it a crime to  
5 deliberately sell this material to the child. All the --  
6 all the -- all the Web publisher has done under this statute  
7 that sends him to jail is to simply make it available to the  
8 general reading public.

9 QUESTION: All right. Suppose -- what in your  
10 opinion is the right way for Congress to go about this?  
11 That is, I assume, and you may not assume, but assume with  
12 me that Congress is not interested in Susie Bright. That's  
13 all fine. They're not really interested in your examples.  
14 What they're interested in are -- is the professional  
15 pornographer and we know who that is and we know what it  
16 looks like, and it's too tough to go after them with the  
17 obscenity statutes because they say artistic, whatever it  
18 is, there's a set of reasons that hasn't been successful.

19 So here's their solution. It's called zoning. We  
20 won't stop people from looking at the worst stuff if they  
21 want to and if they're adults, but you have to take the  
22 subway and go out of Times Square, or if you're on the  
23 Internet, you have to identify that you're not a child.  
24 Now, we know that's a burden, but it's far more consistent  
25 with the First Amendment to let people look at anything they

1 want including this worst possible stuff, as long as they're  
2 not hurting anybody else, and the way to deal with this is  
3 to zone just like we use to do in libraries. If you want to  
4 see the stuff that's locked up, you have to go to the  
5 librarian and identify yourself and show you're not a child  
6 and she'll open it with a key, that used to happen, and you  
7 could go look at it, all right?

8 That's Congress' solution. Now, if that is not a  
9 good solution, what is? Is there no solution?

10 MS. BEESON: Yes, there are a number of solutions  
11 which Congress has now passed which don't present the -- the  
12 problems that this statute does. This is not a zoning  
13 statute, it's a criminal statute, and because it's a  
14 criminal statute it's far more likely to lead to the self-  
15 censorship that -- that causes the big problem here.

16 We now have a Federal filtering law that this  
17 Court upheld, so any child that's accessing the Internet in  
18 a school or a public library has already -- is protected  
19 from most of these images. One of the most -- one of the  
20 important cites in the record that I want to mention here,  
21 the Government put in more exhibits --

22 QUESTION: Your organization didn't -- didn't  
23 support that -- that statute.

24 MS. BEESON: I'm sorry.

25 (Laughter.)

1 MS. BEESON: Yeah.

2 QUESTION: Also, what else, because as you know  
3 from things I've written, I'm very skeptical about the  
4 ability of filtering to deal with millions of families where  
5 there are no parents at home during the day and it's very  
6 tough. So -- so that's one. I'll look at that. What's --  
7 what's two?

8 MS. BEESON: If I could just mention the cite to  
9 the record, Your Honor, because I think it's very important.  
10 The Government put in a lot of sexually explicit images as  
11 their exhibits in this case. They stipulated that every one  
12 of the major filtering products blocked every one of the  
13 images that they submitted as being a problem in this case.

14 QUESTION: Where's that at in the record?

15 MS. BEESON: That is in the joint appendix  
16 beginning at page 170, that's the joint stipulation between  
17 the parties, numbers 45 to 47. That is a pretty ringing  
18 endorsement for filtering software, and again, the district  
19 court specifically found --

20 QUESTION: If it's working what do you do about the  
21 Solicitor General's contention that it's easy to turn the  
22 filters off?

23 MS. BEESON: Your Honor, first of all, that is not  
24 in the record. What the record shows and what the district  
25 court found was that the filters are more effective than

1 COPA, and the reason that they're more effective --

2 QUESTION: When they're working. Do -- do you  
3 contend -- I mean, if -- if we're uncertain whether it's  
4 easy to turn them off or not, let's assume it's not in the  
5 record. I -- it seems to me it's not a good argument on  
6 your part unless -- unless you maintain, and perhaps can  
7 show from the record, that it is -- it is not easy to turn  
8 them off.

9 MS. BEESON: Your -- Your Honor, under this Court's  
10 long-standing precedents, any content-based regulation of  
11 speech is presumptively invalid. It is the Government's  
12 burden to show that there is no less restrictive  
13 alternative, and they did not meet this burden under the  
14 clear record in this case. The district court very clearly  
15 found that the filters were at least as effective. They can  
16 actually block material that is not even commercial that  
17 comes from --

18 QUESTION: When working, when working --

19 MS. BEESON: -- foreign Web sites.

20 QUESTION: When working. The district court didn't  
21 make any finding --

22 MS. BEESON: But --

23 QUESTION: -- about how easy it is to disable them,  
24 did it?

25 MS. BEESON: Because the Government didn't put on



1 any evidence, which is why he said he had to go outside the  
2 record to make that point, when we have only the record to  
3 -- to base the decision on here. Justice Breyer, to get to  
4 the other options that are available, the other things that  
5 Congress can do, one that I want to mention is a new statute  
6 that was passed, 18 U.S.C. -- I believe it's 2252(b) -- it  
7 gets at the Whitehouse.com problem. This is a law that  
8 penalizes sites that knowingly use misleading domain names,  
9 like Whitehouse.com, in order to lure children to this sites  
10 inadvertently. That is another law --

11 QUESTION: Statute -- has that statute been  
12 challenged yet?

13 MS. BEESON: That -- that statute has not been  
14 challenged. It is on the books now, and -- and therefore it  
15 is --

16 QUESTION: You think that's a good one, though?

17 MS. BEESON: It is certainly narrower, Your Honor,  
18 than this statute.

19 QUESTION: I understand that, but you think it's  
20 good, so we can count on the fact that that one's okay?

21 (Laughter.)

22 MS. BEESON: I will argue only that it's --

23 QUESTION: You will demur.

24 MS. BEESON: -- clearly narrower. And one of the  
25 reasons that it's narrower, all -- all jokes aside, is

1 because it gets more clearly at -- at what the statute is  
2 aiming to get at, which is, you know, luring inadvertent  
3 viewers, especially minors, to particular sites, whereas  
4 this -- this law makes it a crime for anyone, any individual  
5 running a small business, you know, Mitch Tepper, our client  
6 who runs a sexual health network --

7 QUESTION: No, no, I understand it's a lot  
8 narrower. I've got -- I agree with you about that. I just  
9 want to be sure you don't stop before I've listed all the  
10 alternatives that you think are possible.

11 MS. BEESON: Yes, Your Honor, and thank you for  
12 returning me to my -- to my task there. Another one is a  
13 law that was passed the same time that COPA was passed --  
14 passed, which requires Internet service providers to give  
15 all customers information about their filters.

16 Another misconception I think left by General  
17 Olson, you don't have to go out and buy another product.  
18 The record shows that all of the major filtering, all of the  
19 major Internet service providers provide these parental  
20 controls as a -- as a default for parents. When you -- when  
21 you set up your account with AOL, it asks you right then and  
22 there, you don't have to pay extra, whether you want to  
23 install the parental controls.

24 There is also a new law --

25 QUESTION: But why did Congress not think these

1     were adequate? I can't understand it. I mean, if that's so  
2     obvious, why -- why didn't Congress see that, that obvious  
3     fact?

4             MS. BEESON: Your Honor, part of the problem, of  
5     course, is that most of these laws that I'm mentioning were  
6     passed after COPA was passed. COPA was passed very early on  
7     in this debate when the Internet was not as well understood  
8     as it is now. Frankly, the -- the solutions that it has  
9     thought up since then have been better, they've been  
10    narrower, and they have had less --

11            QUESTION: Screening existed. They certainly had,  
12    you know, you're relying heavily on that. Those -- those  
13    technologies existed and Congress surely considered them and  
14    thought it was inadequate for some reason.

15            MS. BEESON: Your Honor, the record in the case  
16    shows that it's at least as adequate and where, as here,  
17    there's a record that shows that there is a broad chilling  
18    effect on protected speech for adults because this is a  
19    criminal statute, those -- those tools are -- are --

20            QUESTION: But you're back to your first point now.  
21    I've got down filters, I understand that, and I've got the  
22    domain names, and I want to know if there's anything else.

23            MS. BEESON: Yes. There are two other points I  
24    would like to make on that. One is there's -- Congress has  
25    now created something called the Dot Kids domain, which is a

1 safe environment in which there are sites that are reviewed  
2 that are intended just for children. That Dot Kids domain  
3 can interact with the filters in a way that allows a parent  
4 to set up the AOL account, for example, so that their  
5 younger child has access only to the sites in the Dot Kids  
6 domain.

7 QUESTION: What -- what are -- what are the age  
8 limits that are -- are specified there? Is there something  
9 for the 6-, 7-year-old group and then up to the 15-, 14-,  
10 15-year-old group?

11 MS. BEESON: Your Honor, I believe, I don't have  
12 that statute in front of me, but I believe that that -- that  
13 the idea is to set up a safe environment for children 12 and  
14 under, that that -- that's the way that -- that it's defined  
15 there. And then finally, of course, as we mentioned,  
16 vigorous enforcement of the obscenity law could solve some  
17 of these problems. The Government has not been doing that,  
18 and I think that before --

19 QUESTION: But that, of course, in a sense is  
20 contrary to the -- I mean, from a First Amendment point of  
21 view, isn't it preferable to draw obscenity prosecution  
22 lines favorably towards free speech? And that's -- I  
23 mention that because that seems to me the basic First  
24 Amendment dilemma that I am having, that it is actually  
25 preferable to lean in the direction of letting the adults go

1 and see anything they want, virtually anything. But that  
2 means that there'd be some burden attached, and the burden  
3 that's attached is the key to the spot -- locked room in the  
4 library, the taking New York Times -- Times Square and  
5 moving it out to Yonkers and some place, and here that you  
6 have to identify yourself as an adult.

7 That's the true dilemma I'm having, so when you  
8 suddenly say, oh well, let's, you know, launch a crusade  
9 against the obscenity, from a First Amendment perspective,  
10 that might be worse. So what do you think?

11 MS. BEESON: Your Honor, obscenity --

12 QUESTION: You don't really want that anyway, do  
13 you?

14 MS. BEESON: Obscenity is by definition speech that  
15 is not protected by the First Amendment.

16 QUESTION: Yes, but there are a lot of hard lines  
17 in this area, and a set of prosecutors --

18 MS. BEESON: There --

19 QUESTION: -- who are now determined to go, to --  
20 to -- to crusade in this area could draw a lot of those  
21 lines differently from say you would.

22 MS. BEESON: Well, and I -- and I, of course, am  
23 not trying to say that those prosecutions wouldn't ever  
24 raise a First Amendment issue. Of course they would -- they  
25 would. But this statute raises a First Amendment question

1 in every single application. Every single time this statute  
2 is applied, it violates the First Amendment because the only  
3 options available to speakers would either put them in jail  
4 for making their speech generally available to the public or  
5 -- or prevent adults from accessing that -- that protected  
6 speech because either the speaker has self-censored or  
7 they've put it all behind a screen that the record shows  
8 drives -- drives away the users, and I -- I think I was  
9 going to make just a another cite to the record that I think  
10 is an important one to note, and that is that the  
11 Government's own expert conceded that thousands of users  
12 would be deterred from any single Web site as the result of  
13 any registration system, and that is, again, similar to the  
14 evidence that the Court relied on in striking down the  
15 statutes regulating indecency in cable television in both  
16 the Playboy and the Denver Area cases.

17 This statute has greater problems because it's a  
18 criminal statute. Those statutes, of course, just involve  
19 civil penalties that -- oh, I thought I had that cite to  
20 give you but I actually don't -- I'll try to -- I'll try to  
21 find it in a moment.

22 The -- the district court in its findings of facts  
23 specifically noted that point about the Government's expert  
24 conceding thousands of -- of users.

25 QUESTION: But, just clarify it for a minute. The

1 reason that thousands are deterred are, one, they don't want  
2 to self-identify, and two, they're unable to have credit  
3 cards or something of that kind. Those are the two reasons?

4 MS. BEESON: Yes, and they don't want to self-  
5 identify because they're too embarrassed or because they  
6 don't want to be stigmatized by being associated with the  
7 content.

8 There is an additional reason, which the record  
9 showed, which I think is important to close with, and that  
10 is the nature of this medium. This is an -- a wholly  
11 unprecedented medium of communication. This Court found  
12 that in Reno v. ACLU. It has extremely low barriers to  
13 entry. It allows users to access millions of sites just  
14 through this linking process.

15 The record also showed that by setting up these  
16 barriers that kind of destroyed the nature of accessing  
17 information on the Internet.

18 QUESTION: Would you tell me your response to  
19 General Olson's argument that the self-identification  
20 problem is not serious because there's a restraint on the --  
21 on the transmitter's use of that private information?

22 MS. BEESON: I -- I'm sorry, I didn't follow you,  
23 Justice Stevens.

24 QUESTION: Well, his answer to your self-  
25 identification problem is that self-identification to

1 someone who by law is not allowed to pass that self-  
2 identification on to third parties.

3 MS. BEESON: Your Honor, this Court has -- has  
4 never upheld any statute which --

5 QUESTION: But why shouldn't we uphold that  
6 argument?

7 MS. BEESON: Because it's so clear that it would  
8 deter adults from accessing protected speech. I think that  
9 that is --

10 QUESTION: But I don't see if you rely on your  
11 reason for deterrence is fear of self-identification, and if  
12 the statute makes that fear groundless, I'm not sure your  
13 argument is persuasive.

14 MS. BEESON: Oh, let me then cite to one more  
15 thing, which I meant to get to before and I didn't, and that  
16 is that there is a very big loophole in the privacy  
17 protection in the law and that is -- it's under (d), let me  
18 quickly find it -- under (d)(1), there was an exception --  
19 (d)(2), exceptions to the privacy protection, any -- any  
20 person making a disclosure is not covered, I mean, can make  
21 the disclosure as long as it's necessary to conduct a  
22 legitimate business activity related to making the  
23 communication.

24 That's a fairly big loophole that I think would  
25 make a lot of users very nervous, and of course, the -- the



1 initial problem is that they don't want to give their credit  
2 card or their -- or their ID even to the Web site. I mean,  
3 these are Web sites that they've never seen before. They're  
4 surfing the Web. They're not trusted local stores, they're  
5 -- they're unknown Web sites.

6 QUESTION: Yes, but -- but millions of users of the  
7 Web give their credit card number in order to buy books or  
8 something else that's for sale. I don't understand why  
9 that's such a terrible invasion of privacy.

10 MS. BEESON: Your Honor, in fact, what the record  
11 showed in this case was that the only time that Internet  
12 users were comfortable giving their credit card was when  
13 they were ready to make a purchase. This law applies to --  
14 as General Olson conceded, to just making the speech  
15 available with -- surrounded by advertising. Anybody who  
16 did that, it doesn't just apply to speakers who are selling  
17 their speech on the Web.

18 In closing, I just want to say again that this  
19 Court has repeatedly held that the Government can't burn  
20 down the house to roast the pig, especially with so many  
21 other tools available to protect minors more effectively  
22 than this statute does. The Government cannot send adults  
23 to jail for displaying protected speech in the name of  
24 protecting children. Thank you.

25 QUESTION: Thank you, Ms. Beeson. General Olson,

1     you have four minutes remaining.

2                 REBUTTAL ARGUMENT OF GEN. THEODORE B. OLSON

3                         ON BEHALF OF THE PETITIONER

4                 MR. OLSON: Thank you, Mr. Chief Justice.

5                 QUESTION: Could you address that exception to the  
6     disclosure thing that Ms. Beeson just brought to our  
7     attention?

8                 MR. OLSON: Yes. I don't -- I don't read it that  
9     way. I don't think that's the -- the exception is intended  
10    to -- to allow the person safe harbor by performing the  
11    function of the adult check. I mean, I think that's what  
12    it's intended for --

13                QUESTION: Where --

14                MR. OLSON: -- and it hasn't been, hasn't been  
15    identified before as a giant loophole in the statute, and I  
16    don't think it's susceptible to that construction.

17                I wanted to go back to where Justice Breyer  
18    started, what would be covered by the statute? The examples  
19    given by the respondents were addressed in the Government's  
20    brief and all three of the -- all of those examples we don't  
21    believe are covered by the statute. Susie Bright is not  
22    within, doesn't fit within the prurient interest in the --  
23    and would be defended on -- this is reminiscent of what the  
24    Court was facing in the American Booksellers case, and the  
25    respondents here were involved in that one as an amicus,

1     were 16 examples were cited as the house was going to fall  
2     down, the sky was going to fall.

3             This Court decided to remand that to the -- the  
4     Virginia Supreme Court and the Virginia Supreme Court found  
5     that none of the 16 parade of horrors would be even  
6     covered by the statute. That's this all over again, and it  
7     flies in the face of the requirement by this Court to find a  
8     reasonable, a construction of the statute that would be, to  
9     which it would be reasonably susceptible that would deal  
10    with those constitutional problems.

11            And -- and these definitions, these definitions  
12    have already been approved with respect to minors in the  
13    Ginsberg v. New York case, so we're not -- and that's a  
14    couple of -- several decades ago, so we're not dealing with  
15    something that is brand new. Susie Bright, by the way,  
16    writes for Salon magazine. In order to get her column you  
17    have to register.

18            Adult IDs, you can get them with credit cards, you  
19    can get them with a check, and as we point out in footnote 2  
20    of our brief, you can use a driver's license or a passport,  
21    so you don't have to necessarily use a credit card to do  
22    that. The -- the deterrence issue, all of the -- all of the  
23    -- all the court of -- the lower courts decided is that some  
24    people may be deterred, may be deterred, and some people may  
25    be -- find this as an impediment. Some people may engage in

1 self-center -- self-censorship, and to the extent that there  
2 are thousands of people, that's an infinitesimal quantity of  
3 what's on -- on the Web in itself.

4           The most important point here, with respect to  
5 alternatives, Congress considered, as this Court suggested  
6 it should, the various alternatives. The House, the Senate  
7 report's good, but the House report, 775, which is cited all  
8 over the briefs on pages 16 through 20 considered all of  
9 these examples, the tagging, the filtering and so forth and  
10 went through all of the reasons why Congress found that they  
11 would not be effective and that what COPA was providing  
12 would be effective, that there were costs, the burden should  
13 be on the commercial purveyor of the material and so forth.  
14 Congress went through all of these things and made specific  
15 findings.

16           At the end of the day, it's important to emphasize  
17 this is a facial challenge to a statute constructed  
18 according to this Court's guidance, according to this  
19 Court's decisions as to how to deal with a very serious  
20 national problem. It contains a scienter requirement the  
21 purveyor of this material must know what's being done, he  
22 must be engaged in the regular course of business, and I  
23 can't recall -- I think it was you, Justice Breyer -- who  
24 asked the question, how else could Congress have done it?  
25 This is a national problem. It's serious. It's causing

1 irreparable injury to our most important resource, our  
2 children.

3 Congress has been struggling with this. It  
4 listened to what this court had -- Court had to say. It  
5 examined the nature of the medium, because this is a  
6 different medium, but one of the wonderful things about this  
7 medium is also the -- one of the potentially dangerous parts  
8 of this medium. It's easily accessible to children in the  
9 home and it's important that the Government be -- this  
10 Nation and its three branches of government be concerned  
11 with the care and welfare of children independent of the  
12 parents' responsibility.

13 So this is an example of a serious national  
14 problem, Congress following conscientiously this Court's  
15 guidance as to how to solve the problem and then laying it  
16 out for this Court as to how it did so, and it came up with  
17 this statute, which is constitutional.

18 CHIEF JUSTICE REHNQUIST: Thank you, General Olson.  
19 The case is submitted.

20 (Whereupon, at 12:11 p.m., the case in the above-  
21 entitled matter was submitted.)

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23

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25